IN THE COURT OF APPEAL

AT NYERI

CRIMINAL APPEAL NO 132 OF 2002

MORRIS MUHORO KINGORI V REPUBLIC

Shah, O'Kubasu & Keiwua JJ A

(Appeal from Judgment of the High Court at Nyeri (Juma & Mitey JJ) dated 31.07. 2002

In

HCCR Appeal No 45 of 2001)

JUDGMENT

The appellant, Morris Muhoro Kingori, was convicted by the learned Senior Resident Magistrate at Nyeri, of the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death as mandatorily provided by the law. His appeal to the High Court was dismissed and he comes to us by way of a second appeal.

The facts of the case may be briefly stated. It was the prosecution's case that both the appellant and the complainant (David Irungu) hailed from the same village and on the 24th October, 2000 the complainant was walking home in the company of Mwangi Thuku (PW2). It was about 9.30 pm when the complainant saw the appellant and another person standing beside a path. The complainant flashed his torch and was able to recognize the appellant but not the other person. The appellant and his companion attacked the complainant who fell down. The complainant was able to recognize the appellant who had an iron bar and a sword. In the course of the robbery the appellant lost 1,000/- and his livestock trader's licence. The complainant was hit near the nose and was injured. When he screamed one Peter Muregi Thuku (PW2) came to the scene and complainant informed Thuku that it was the appellant who had robbed him. This incident was reported to the police who arrested the appellant after two months.

When put to his defence, the appellant stated that on 2nd January, 2000 he was going home from Nyahururu and that when he reached Othaya he went to Kiereini where he slept and that the following day he was arrested.

In convicting the appellant the learned trial magistrate stated inter alia:- "I find that the complainant was consistent in his evidence, he informed Muregi (PW2) that it was accused and another who had attacked him, he also informed a police officer (PW3) on the same day that it was accused and another who had attacked him. I find from this evidence that the circumstances were favourable for the complainant to

identify the accused person. He described vividly what weapon each assailant possessed which in view means that he had time to see the assailants clearly. I find that the accused was a person known to the complainant since his youth and therefore this evidence is more of recognition than identification".

In dismissing the appellant's appeal the learned judges of the superior court (Juma and Mitey JJ) expressed themselves thus:- "We have considered the appeal. We find the evidence against the appellant overwhelming and credible. This is a case of recognition and not identification. PW1 knew the appellant before. They are closely related. PW1 flashed a torch on the appellant while he was about 3 metres away. In those conditions and from that distance we believe that PW1 clearly saw and recognized the appellant. Although the conviction of the appellant was based on the identification of a single witness we think the trial magistrate rightly found that PW1 gave evidence that was correct and consistent. It is apparent that the appellant went underground after the commission of the offence. PW1 assigned people to trace the appellant. He was nabbed after 3 months.

All the essential ingredients of the offence under section 296(2) of the Penal Code were met. The robbers were two, the appellant had an iron bar while his colleague had a sword. These weapons were produced as exhibits at the trial. The robbers used violence on PW1 and injured him."

When this appeal came up for hearing before us on 12th May, 2003, Mr Gachoka for the appellant made it his main ground of appeal that the evidence of identification was unsatisfactory in that it was the evidence of a single eye-witness at night in which case the prevailing conditions were not favourable for accurate identification. To counter that submission Mr Oluoch, the learned Senior Principal State Counsel, argued that the evidence against the appellant was based on recognition rather than identification and that there were concurrent findings on that issue by the trial court and the first appellate court.

We have considered the evidence upon which the appellant was convicted and the submission of the appellant's counsel. It cannot be denied that the appellant was convicted on the evidence of identification, nay, recognition, by a single witness at night. The witness who was the complainant testified that he knew the appellant as they were related. Although it was at night the complainant had a torch which he flashed as he approached the appellant and his companion. The two courts below were alive to the nature of evidence against the appellant, viz, evidence of a single eyewitness at night. This is evidence which calls for greatest care before basing a conviction upon it – see–Abdalla Bin Wendo & Another v R (1953) 20 EACA 166 Roria v R [1967] EA 583 and Kamau v R [1975] EA 139.

As correctly pointed out by both the trial court and the first appellate court the evidence upon which the appellant was convicted was that of recognition. In Anjononi and Others v R [1980] KLR 54 at p 60 this court stated inter alia: "Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

On our part, we have carefully considered the evidence recorded by the trial court, the findings made thereon and the observations of the first appellate court, and we are satisfied that there was no mistake as to the identity of the appellant. He was properly found guilty of the offence on which he was convicted.

As regards the complaint that the charge sheet was defective all we can say is that the appellant was in the company of another person and they were armed with a sword and iron bar. They inflicted serious injuries to the complainant as can be found in the evidence of James Ndungu Mwangi (PW5) the clinical officer who examined the complainant. The clinical officer classified the degree of injury inflicted to the

complainant as harm.

The essential ingredients for the offence of robbery with violence contrary to section 296(2) of the Penal Code, were met. We do not think that the use of the word “pangas” instead of “sword” in the charge sheet is fatal to the conviction. Such use occasioned no prejudice to the appellant in as much as both are implements or weapons whose use is of the same effect.

In view of the foregoing, we are satisfied that the appellant’s guilt was proved beyond any reasonable doubt. We find no merit in this appeal and the same is dismissed.

Delivered on May 16, 2003

Shah, O’Kubasu & Keiwua JJ A